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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 JAVIER H. GUERRA,

12 Plaintiff,

13 v.

14 A. MARTINEZ,

15 Defendant.
16

No. 2:20-CV-0836-DJC-DMC-P

FINDINGS AND RECOMMENDATIONS

17 Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to
18 42 U.S.C. § 1983.

19 A review of the docket reflects that all defendants other than A. Martinez have
20 been dismissed from this action. As to Defendant A. Martinez, summons was returned
21 unexecuted on October 7, 2021. See ECF No. 22. On February 27, 2023, Plaintiff was directed
22 to show cause in writing within 30 days why this action should not be dismissed for failure to
23 effect timely service on the sole remaining defendant pursuant to Federal Rule of Civil Procedure
24 4(m). Plaintiff was cautioned that failure to comply could result in dismissal of the entire action
25 for lack of prosecution. See Local Rule 110. To date, Plaintiff has not responded to the February
26 27, 2023, order to show cause or served Defendant Martinez.

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1 The Court must weigh five factors before imposing the harsh sanction of dismissal
2 for lack of prosecution. See Bautista v. Los Angeles County, 216 F.3d 837, 841 (9th Cir. 2000);
3 Malone v. U.S. Postal Service, 833 F.2d 128, 130 (9th Cir. 1987). Those factors are: (1) the
4 public's interest in expeditious resolution of litigation; (2) the court's need to manage its own
5 docket; (3) the risk of prejudice to opposing parties; (4) the public policy favoring disposition of
6 cases on their merits; and (5) the availability of less drastic sanctions. See id.; see also Ghazali v.
7 Moran, 46 F.3d 52, 53 (9th Cir. 1995) (per curiam). A warning that the action may be dismissed
8 as an appropriate sanction is considered a less drastic alternative sufficient to satisfy the last
9 factor. See Malone, 833 F.2d at 132-33 & n.1. The sanction of dismissal for lack of prosecution
10 is appropriate where there has been unreasonable delay. See Henderson v. Duncan, 779 F.2d
11 1421, 1423 (9th Cir. 1986).

12 Having considered these factors, and in light of Plaintiff's failure to serve
13 Defendant Martinez or respond to the Court's February 27, 2023, order to show cause, the Court
14 finds that dismissal of this action is appropriate.

15 Based on the foregoing, the undersigned recommends that this action be dismissed,
16 without prejudice, for lack of prosecution and failure to comply with court rules and orders.

17 These findings and recommendations are submitted to the United States District
18 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
19 after being served with these findings and recommendations, any party may file written
20 objections with the court. Responses to objections shall be filed within 14 days after service of
21 objections. Failure to file objections within the specified time may waive the right to appeal. See
22 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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24 Dated: April 28, 2023



25 DENNIS M. COTA
26 UNITED STATES MAGISTRATE JUDGE
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